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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of	)	
	)	
Revision of the Commission's Rules	)	CC Docket No. 94-102
to Ensure Compatibility with Enhanced	)	
911 Emergency Calling Systems	)	
	)	
Wireless Telecommunications Bureau	)	DA 01-1623
Seeks Further Comment on the Commission's	)	
Rules Concerning Public Safety Answering	)	
Point Requests for Phase II Enhanced 911	)	
To: Wireless Telecommunications Bureau		

**COMMENTS OF CINGULAR WIRELESS LLC**

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July 25, 2001

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## SUMMARY

The “clarification” of Section 20.18(j) of the Commission’s rules as proposed by the City of Richardson (“Richardson”) is unnecessary and procedurally improper. The rules clearly provide that a request for Phase II E911 from a public safety answering point (“PSAP”) is not valid unless the PSAP *is* currently able to receive and utilize data elements. Richardson asks for the rule to be clarified to allow a PSAP to make a valid request based on assurances that the PSAP *will be capable* at some time in the future to trigger the start of the six-month period during which a carrier must deploy. In effect, Richardson asks the Bureau to contravene the plain reading of the rule as adopted by the Commission as well as its basis and purpose as determined by the Commission.

Agencies are allowed to issue interpretive rules without following the notice-and-comment procedures of the Administrative Procedure Act (“APA”). However, the interpretation cannot legislate a clear rule change and must conform with the purpose of the regulations. In this instance, the rule and its purpose make abundantly clear that a PSAP must be ready and able to use Phase II data at the time it requests the data from a covered CMRS carrier. There is simply nothing to clarify. A clarification eliminating the “is capable” condition of a valid PSAP request will thus supplant the rulemaking procedures and violate the APA. Only the full Commission can substantively change the rule by initiating a new rulemaking in accordance with Section 553 of the APA, providing a reasoned explanation as to why it doubts that the original basis and purpose underlying the rule no longer serves the public interest and identifying a new basis and purpose.

Further, there is no evidence in the record to justify a change in the rule. In adopting Section 20.18(j), the agency recognized that carriers have limited resources and cannot possibly respond immediately to all PSAP requests in their service areas. Accordingly, by requiring PSAPs to be capable at the time of their request, carriers can focus their resources on those PSAPs that are actually ready to deploy which in turn expedites the deployment of E911. Neither Richardson nor other public safety commenters have shown that the Commission’s rationale for adopting the “is capable” condition is no longer valid. PSAPs simply contend, as they did at the time the current rule was adopted, that E911 deployment will be expedited by changing the rule. This rationale was specifically rejected by the Commission’s adoption of a rule that balanced PSAP readiness against limited carrier resources.

Assuming arguendo the Bureau could lawfully change Commission rules, eliminating the “is capable” condition in favor of “will be capable” assurances from PSAPs will not expedite the deployment of Phase II E911. It will instead embroil the agency in numerous case-by-case decisions to determine whether or not a PSAP has in fact satisfied the certification of capability. Further, the Bureau has no method of enforcing such certifications against PSAPs if they in fact are not ready as promised. Moreover, sovereign immunity may insulate PSAPs from damage suits associated with premature requests. Without any penalty for PSAP requests that ultimately prove premature, a “will be capable” condition will impede the deployment of Phase II E911 by limiting the resources available for those PSAPs that are ready. The Commission’s condition of

PSAP readiness provides certainty for both parties as to when the carrier's obligation is triggered and avoids the unnecessary waste of carrier resources.

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To: Wireless Telecommunications Bureau

**COMMENTS OF CINGULAR WIRELESS LLC**

Cingular Wireless LLC ("Cingular") hereby submits comments in response to the *Public Notice* issued by the Wireless Telecommunications Bureau ("the Bureau") on July 10, 2001, seeking further comment on whether an "amendment to clarify" the Commission's rules should be adopted in connection with a petition filed by the City of Richardson, Texas ("Richardson").<sup>1</sup> The plain language of Section 20.18(j) requires that a public safety answering point ("PSAP") is capable of handling E911 location information before a covered commercial mobile radio service ("CMRS") provider must begin implementing Phase II E911.<sup>2</sup> Richardson's petition seeks a "clarification" of the rule so that a PSAP can require a CMRS provider to begin implementing Phase II E911 merely by notifying the carrier the PSAP will be capable of utilizing the information at some point in the future.<sup>3</sup>

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<sup>1</sup> Public Notice, "Wireless Telecommunications Bureau Seeks Further Comment on the Commission's Rules Concerning Public Safety Answering Point Requests for Phase II Enhanced 911," CC Docket No. 94-102, DA 01-1623 (July 10, 2001), 66 Fed. Reg. 36,989 (July 16, 2001) ("Public Notice").

<sup>2</sup> 47 C.F.R. § 20.18(j).

<sup>3</sup> Public Notice, "Wireless Telecommunications Bureau Seeks Comment on Request for  
(continued...)

As discussed below, there is nothing for the Bureau to clarify. The Commission's rules clearly provide that a PSAP request is not valid unless the PSAP is currently able to receive and utilize Phase II E911 data. Thus, the purported clarification is really a change in the rule and its basis and purpose. Only the full Commission can substantively change the rule by initiating a new rulemaking in accordance with Section 553 of the Administrative Procedure Act ("APA") and by providing a reasoned explanation as to why its original basis and purpose no longer serves the public interest and a new rule is needed.<sup>4</sup> Assuming the Commission was deciding whether to change the rule, there is no reason to change the equation struck in the previous rulemaking regarding PSAP readiness and limitations in the deployment of CMRS resources.

### **BACKGROUND**

Pursuant to Section 20.18 of the Commission's rules, covered CMRS licensees must provide location information for 911 calls to a designated PSAP provided certain conditions are met.<sup>5</sup> These conditions are set forth in Section 20.18(j) which clearly requires that a PSAP must be capable of utilizing E911 information before any carrier obligations are triggered:

The requirements set forth in . . . this section shall be applicable only if the administrator of the designated Public Safety Answering Point has requested the services required under those paragraphs *and is capable of* receiving and utilizing the data elements associated with the service, and a mechanism for recovering the Public Safety Answering Point's costs of the enhanced 911 service is in place.<sup>6</sup>

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<sup>3</sup> (...continued)

Clarification or Declaratory Ruling Concerning Public Safety Answering Point Requests for Phase II Enhanced 911," CC Docket No. 94-102, DA 01-886 (Apr. 5, 2001) ("Public Notice, DA 01-886").

<sup>4</sup> 5 U.S.C. § 553; 47 C.F.R. § 0.331(d).

<sup>5</sup> 47 C.F.R. § 20.18.

<sup>6</sup> 47 C.F.R. § 20.18(j) (emphasis added).

In the *Report and Order* adopting these requirements, the Commission clearly stated that the E911 Phase II requirements “shall apply only if . . . a carrier receives a request for such E911 services from the administrator of a PSAP *that is capable* of receiving and utilizing the data elements associated with the services.”<sup>7</sup>

During the reconsideration proceeding, the PSAP community asked the Commission to change the arrangement so that the parties deploy their E911 capabilities “together, rather than in sequence.”<sup>8</sup> The Commission nonetheless retained the “is capable” provision to:

*ensure that carriers are not required to make unnecessary expenditures in response to a PSAP that is not ready to use the E911 information. . . . Apart from the significant costs involved, because location technologies are evolving and improving in the short term and the costs of those technologies are decreasing, the public, the PSAP and the carrier benefit from a requirement that is not triggered until the actual time at which the PSAP can take advantage of the E911 service.*<sup>9</sup>

On April 5, 2001, Richardson filed a petition requesting a clarification and/or declaratory ruling and the Bureau placed the petition on public notice the same day. Richardson requested a clarification that a PSAP request is deemed valid, thus triggering the Phase II E911 obligations of a CMRS carrier, if the PSAP *promises* that it “will be capable” of receiving and utilizing the E911 data elements prior to delivery. The vast majority of the commenters, including Cingular,

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<sup>7</sup> *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, *Report and Order and Further Notice of Proposed Rulemaking*, 11 F.C.C.R. 18676, 18684 (1996).

<sup>8</sup> Opposition and Comments of National Emergency Number Association (“NENA”), Association of Public-Safety Communications Officials-International, Inc. (“APCO”), and National Association of State Nine One One Administrators, CC Docket No. 94-102, at 6 (Oct. 8, 1996).

<sup>9</sup> *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, *Second Memorandum Opinion and Order*, 14 F.C.C.R. 20850, 20879 (1999) (emphasis added) (footnote omitted), *recon. denied*, 15 F.C.C.R. 22810 (2000), *affirmed sub nom.*, *United States Cellular Corp. v. FCC*, 2001 U.S. App. LEXIS 14395 (D.C. Cir. June 29, 2001) (“*Second Reconsideration Order*”).

correctly pointed out that a clarification was not necessary or proper because the requirements for a valid PSAP request for E911 location information under Section 20.18(j) are clear.<sup>10</sup>

Richardson's petition thus amounted to either (i) an untimely filed petition for reconsideration of the *Second Reconsideration Order* because it was filed after the 30 day period,<sup>11</sup> or (ii) an improper request to change established rules without following the procedures set forth in Section 553 of the APA.<sup>12</sup> The few commenters that filed in support of Richardson's request, however, read ambiguity into the rule where none existed and supported "clarification."<sup>13</sup>

Inexplicably, the Bureau found that "[b]ased on the language of the rule, itself, the Commission's orders addressing the rule and the comments and reply comments of interested

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<sup>10</sup> See Blooston, Mordkofsky, Dickens, Duffy & Prendergast Comments, CC Docket No. 94-102, at 3 (Apr. 23, 2001); Cingular Comments, CC Docket No. 94-102, at 2-3 (Apr. 23, 2001); Cellular Telecommunications & Internet Association Comments, CC Docket No. 94-102, at 3-4 (Apr. 23, 2001); Qwest Wireless LLC Comments, CC Docket No. 94-102, at 2-5 (Apr. 23, 2001); Sprint Spectrum L.P., d/b/a Sprint PCS Comments, CC Docket No. 94-102, at 3-5 (Apr. 23, 2001) ("Sprint PCS Comments"); U.S. Cellular Corporation Comments, CC Docket No. 94-102, at 2-4 (Apr. 23, 2001); Verizon Wireless Comments, CC Docket No. 94-102, at 3-6 (Apr. 23, 2001) ("Verizon Comments"); VoiceStream Wireless Corporation Comments, CC Docket No. 94-102, at 5-8 (Apr. 23, 2001) ("VoiceStream Comments"); Western Wireless Corporation Comments, CC Docket No. 94-102, at 2-4 (Apr. 23, 2001).

<sup>11</sup> 47 U.S.C. § 405.

<sup>12</sup> 5 U.S.C. § 553.

<sup>13</sup> For example, without even addressing the Commission's prior orders on the rule, North Carolina Wireless 911 Board ("NCW") suggested that Section 20.18(j) is ambiguous because it "mixes grammatical tenses." That is, a carrier's E911 obligations are not triggered until a PSAP "has requested" (past tense) such service and "is capable" (present tense) of using the service. NCW Comments, CC Docket No. 94-102, at 2 (Apr. 23, 2001). Similarly, APCO stated that requiring a PSAP to be capable of receiving and utilizing the data elements at the time of the request "ignores the plain meaning of the rule" and "would be entirely inconsistent with the Commission's efforts to accelerate wireless 911 service." APCO Comments, CC Docket No. 94-102, at 3 (Apr. 23, 2001).



parties, it appears that the rule as written may be capable of more than one interpretation.”<sup>14</sup> The Bureau thus issued the instant Public Notice which it published in the Federal Register, requesting further comment on “whether the rule should be amended to clarify its meaning.”<sup>15</sup> Specifically, the Bureau sought comment on what objective criteria could be required for a PSAP to assure that it *will be capable* of utilizing Phase II E911 data elements on a date certain. These criteria would then be used to determine whether a PSAP request is valid, rather than the Commission-imposed requirement that the PSAP *be capable* at the time the request is submitted.

## DISCUSSION

### I. THE BUREAU CANNOT SUBSTANTIVELY CHANGE A CLEAR RULE THROUGH AN UNNECESSARY CLARIFICATION

A fundamental principle of administrative law is that once an agency adopts clear rules, it must adhere to those rules.<sup>16</sup> A plain reading of Section 20.18(j) establishes that a PSAP request for E911 location information is only valid if the PSAP “is capable” of receiving and utilizing data at the time of the request, *not* that the PSAP “will be capable” of receiving the data at some point in the future. In adopting the rule, the Commission balanced competing interests to expedite the E911 implementation process and correctly decided to condition a valid request on a PSAP being “capable.” This ensures that carriers do not waste finite resources on PSAPs that are not ready to implement E911.<sup>17</sup>

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<sup>14</sup> Public Notice at 2.

<sup>15</sup> *Id.*; 66 Fed. Reg. 36,989 (July 16, 2001).

<sup>16</sup> *Reuters Ltd. v. FCC*, 781 F.2d 946, 950-51 (D.C. Cir. 1986).

<sup>17</sup> *Second Reconsideration Order*, 14 F.C.C.R. at 20879.

The Commission has since provided even further demonstrations of the need for PSAP capability at the time of the request in the *Second Reconsideration Order* where it last modified the condition stating:

- “In originally conditioning the carrier’s obligation on the receipt of a request from a PSAP *with the capability to receive and utilize the information*, the Commission recognized that implementation will require investment in facility and equipment upgrades *to be able to request the service*.”<sup>18</sup>
- “Carriers cannot fulfill their obligations, however, unless and until the States’ 911 systems are capable of receiving and utilizing the E911 information *so that PSAPs can make a valid request for the service*.”<sup>19</sup>
- “We retain the [PSAP cost recovery] provision to *ensure that carriers are not required to make unnecessary expenditures in response to a PSAP that is not ready to use the E911 information*. . . . Apart from the significant costs involved, because location technologies are evolving and improving in the short term and the costs of those technologies are decreasing, the public, the PSAP and the carrier benefit from *a requirement that is not triggered until the actual time at which the PSAP can take advantage of the E911 service*.”<sup>20</sup>
- “The funding of the PSAP is a critical component of the PSAP’s capabilities to receive and utilize the E911 data, which the E911 rules require *before the PSAP may make a valid request for service from the carrier*.”<sup>21</sup>
- “Carriers also would benefit from *receiving requests from PSAPs that are ready to receive the carriers’ transmissions*, thereby avoiding unnecessary expenditures or investments in their networks.”<sup>22</sup>

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<sup>18</sup> *Id.* at 20877 (emphasis added).

<sup>19</sup> *Id.* at 20878 (emphasis added).

<sup>20</sup> *Id.* at 20879 (emphasis added) (footnote omitted).

<sup>21</sup> *Id.* at 20909 (supplemental final regulatory flexibility analysis) (emphasis added).

<sup>22</sup> *Id.* (supplemental final regulatory flexibility analysis) (emphasis added).

No PSAP challenged the Commission's rulemaking further.<sup>23</sup> The rule became effective on April 27, 2000.<sup>24</sup>

While agencies are allowed to issue interpretive rules without following the notice-and-comment procedures of the APA, the interpretation must be reasonable, and must sensibly conform to the purpose and wording of the regulations.<sup>25</sup> As the D.C. Circuit Court has stated:

When an agency promulgates a legislative regulation . . . it may not subsequently repudiate that announced meaning and substitute for it a totally different meaning without proceeding through the notice and comment rulemaking required for amendments of a rule.<sup>26</sup>

That is in essence what would happen here if the Richardson proposal were adopted.

The rule and its purpose make abundantly clear that a PSAP must be ready and able to use Phase II data at the time it requests the data from a covered CMRS carrier. Thus, there simply is nothing to clarify. A "clarification" eliminating the "is capable" condition of a valid PSAP request would substantially change the rule and the balance struck therein.

In order to substantively amend a rule that has become final, the Commission must commence a new rulemaking consistent with the provisions of the APA. Thus, the only available option is for the Commission to initiate a rulemaking. The APA requires that for a proper

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<sup>23</sup> Carriers did challenge the agency's elimination of the carrier cost recovery requirement, but the Commission's order was affirmed. See *U.S. Cellular*, 2001 U.S. App. Lexis 14395.

<sup>24</sup> 64 Fed. Reg. 72,951 (1999).

<sup>25</sup> 5 U.S.C. § 553(b)(3)(A); see *Martin v. Occupational Safety and Health Rev. Comm'n*, 499 U.S. 144, 150-151 (1991) (citing *Lying v. Payne*, 476 U.S. 926, 939 (1986), *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965), and *Northern Ind. Pub. Ser. Co. v. Porter County Chapt. of Izaak Walton League of America, Inc.*, 423 U.S. 12, 15 (1975)).

<sup>26</sup> *National Family Planning v. Sullivan*, 979 F.2d 227, 231 (D.C. Cir. 1992); see also *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997) ("Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.").

rulemaking the Commission must provide: (i) notice of the proposed rulemaking, (ii) an opportunity for interested persons to comment, and (iii) “a concise general statement of [the] basis and purpose” of the rules ultimately adopted.<sup>27</sup> Where a rule is being changed, the Commission must acknowledge it is considering a change and the reasons why it believes its original basis and purpose were wrong.<sup>28</sup> None of these statutory requirements has been complied with here.

Moreover, the Bureau cannot supplant the Commission here because it lacks authority to change rules (and their basis) or issue novel clarifications. Specifically, Section 0.331(d) of the Commission’s rules states that:

[t]he Chief, Wireless Telecommunications Bureau shall not have the authority to act upon notices of proposed rulemaking and inquiry, final orders in rulemaking proceedings and inquiry proceedings, and reports arising from any of the foregoing except such orders involving ministerial conforming amendments to rule parts . . . where novel questions of fact, law, or policy are not involved.<sup>29</sup>

The Commission has thus reserved for itself the right to change its rules in any meaningful way or make rulings that involve novel clarifications.<sup>30</sup>

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<sup>27</sup> 5 U.S.C. § 553(b)-(c).

<sup>28</sup> See, e.g., *Motor Vehicle Mfrs. Assn. v. State Farm Mut.*, 463 U.S. 29, 52 (1982) (reversing a decision to eliminate the airbag requirement without a full rulemaking); *Greater Boston Tel. Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir.), cert. denied, 403 U.S. 923 (1971) (“[A]n agency changing its course must supply a reasoned analysis indicating the prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.” (footnote omitted)).

<sup>29</sup> 47 C.F.R. § 0.331(d).

<sup>30</sup> See 47 C.F.R. § 0.331(d); see, e.g., *Southwestern Bell Telephone Company Revisions to Tariff F.C.C. No. 6*, 6 F.C.C.R. 3760, 3766 (1991) (noting that the limits contained in Section 0.291 on the Common Carrier Bureau’s delegated authority were intended “to reserve to the Commission the authority to initiate rules of general applicability”); see also *Responsible Accounting Officer Letter 20, Uniform Accounting for Postretirement Benefits Other than Pensions in Part 32*, AAD (continued...)

In the Public Notice, the Bureau proposes to allow PSAPs to make a valid request *without* “being capable.”<sup>31</sup> The proposed change will thus trigger a carrier’s obligation to invest resources for system upgrades even though the PSAP is not ready to utilize the service. The Bureau’s proposed amendment is in direct conflict with the plain reading of the rule as well as the basis and purpose underlying the rule as promulgated by the Commission. The change can therefore not be deemed a “ministerial conforming amendment.”

Substantively, there is no evidence in the record to justify a change in the rule. In adopting Section 20.18(j), the agency recognized that carriers have limited resources and cannot possibly respond immediately to all PSAP requests in their service areas. Accordingly, by requiring PSAPs to be capable at the time of their request, carriers can focus their resources on those areas that are actually ready to deploy which in turn expedites the deployment of E911. Neither Richardson nor other public safety commenters have shown that the Commission’s rationale for adopting the “is capable” condition is no longer valid. PSAPs simply contend, as they did at the time the current rule was adopted, that E911 deployment will be expedited by changing the rule because PSAPs will not have to wait to be capable before requesting service. This rationale was specifically rejected by the Commission’s adoption of a rule that balanced PSAP readiness against limited carrier resources.

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<sup>30</sup> (...continued)

92-65, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 11 F.C.C.R. 2957, 2961 (1996) (vacating Bureau order changing rule for lack of delegated authority).

<sup>31</sup> Public Notice at 2.

## **II. BUREAU'S AMENDMENT WILL NOT EXPEDITE DEPLOYMENT OF PHASE II E911**

Assuming *arguendo* the Bureau could lawfully change Commission rules, eliminating the "is capable" condition for a valid PSAP request will not expedite the deployment of Phase II E911. Changing the condition will simply lead to more premature requests because, as pointed out by the commenters, many PSAPs have unrealistic expectations of what it takes to be capable.<sup>32</sup> Premature requests will thus cause carriers to divert resources, resulting in further delays to PSAPs that are ready. If anything, the Commission should study how to verify PSAP assertions that they are presently capable.

The Bureau seeks to mitigate the potential for premature requests, however, by requiring PSAPs to give assurances based on an objective criteria that they will be ready prior to delivery of service. Such a standard will embroil the agency in numerous case-by-case decisions to determine whether or not a PSAP has in fact satisfied the certification of capability. Further, the Bureau has no method of enforcing such certifications against PSAPs if they in fact are not ready as promised. Moreover, sovereign immunity may insulate PSAPs from damage suits for making premature requests.<sup>33</sup> Without any penalty for PSAP requests that ultimately prove premature, a

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<sup>32</sup> See VoiceStream Comments at 10-14, Sprint PCS Comments at 5-6; Verizon Comments at 8; see also Ben Charny, "Response Slow on 911 for Wireless — Most Carriers Unlikely to be Ready for October Deadline on Allowing Police to Mobile Phone Users Seeking Help, [www.msnbc.com/news](http://www.msnbc.com/news) (released July 19, 2001) (stating that local police may share blame for delayed deployment of Phase II E911).

<sup>33</sup> See *College Savings*, 527 US at 672; *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 US 627, 636 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44, 72 (1996) ("Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States."). A state may waive this immunity however when "the State voluntarily invokes" federal jurisdiction or when "the State makes a 'clear declaration' that it intends to submit itself" to federal jurisdiction by a provision in its constitution or statutes, or  
(continued...)

“will be capable” condition will impede the deployment of Phase II E911 by limiting the resources available for those PSAPs that are ready. As pointed out by Verizon in the Richardson proceeding, the Commission’s requirement of PSAP readiness provides certainty for both parties as to when the carrier’s obligation is triggered and avoids the unnecessary waste of carrier resources.<sup>34</sup>

### CONCLUSION

As stated above, the Commission’s rules clearly and properly define the prerequisites for a valid PSAP request for E911 services. Accordingly, clarification is unnecessary and improper. The only way to alter these prerequisites is through a notice and comment rulemaking conducted by the full Commission.

Respectfully submitted,

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<sup>33</sup> (...continued)

by its conduct in implementing a particular federal program. *College Savings*, 527 U.S. at 675-76 (citations omitted); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985).

<sup>34</sup> Verizon Comments at 7-8.